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# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 937

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY  
COMMISSIONERS OF THE STATE OF NEW JERSEY,  
APPELLANTS

v.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD  
COMPANY, UNITED STATES OF AMERICA AND INTER-  
STATE COMMERCE COMMISSION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY

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## MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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The United States and the Interstate Commerce Commission did not appeal from the decision below because we were not convinced that the questions presented were of sufficient importance to warrant our seeking review by this Court. We were persuaded principally by the consideration that the factual situation involved appears to be an unusual one. We wish to advise the Court, however, that we share the view of the State of New Jersey and its Board of Public Utility Commissioners that the court below is clearly in error.

The question presented is whether the New York, Susquehanna and Western Railroad Company (Susquehanna) must follow the procedure set forth in Section 13a(1) of the Interstate Commerce Act,<sup>1</sup> as the court below held, or that set forth in Section 13a(2) of the Act, in seeking to discontinue three commuter passenger trains. The trains operate between points in New Jersey and Susquehanna Transfer, New Jersey, at which point passengers transfer to or from New York City via a reserved bus operated by an independent motor carrier under contract with Susquehanna. The procedure set forth in Section 13a(1) governs "the discontinuance \* \* \* of the operation or service of any train or ferry operating from a point in one State to a point in any other State" (J.S. 45) whereas Section 13a(2) governs "the discontinuance \* \* \* of the operation or service of any train or ferry operated wholly within the boundaries of a single State" (J.S. 46).

The practical consequences of the lower court's decision that Section 13a(1) applies (J.S. 24) are that Susquehanna may discontinue the trains by filing and posting 30-day notices, unless the Commission institutes an investigation during that period, pending completion of which the Commission may also require continuance of the trains for not more than four months; and upon completion of such investigation, the Commission may, upon appropriate findings, order continuance of the service for a year. The Commission's view is that the applicable procedure is pre-

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<sup>1</sup> Section 13a of the Act (49 U.S.C. 13a) is set forth in Appendix E to the Jurisdictional Statement at pp. 45-47.

scribed in Section 13a(2), which requires resort first to state authorities: before applying to the Commission the carrier must establish that a State commission has refused to authorize such discontinuance, or has failed to act upon a petition for discontinuance pending for 120 days; thereupon the Commission may authorize such discontinuance "*only* after full hearing" (J.S. 46, emphasis supplied).

Sections 13a(1) and 13a(2) were enacted in 1958 to give the Interstate Commerce Commission power to authorize railroads to discontinue or reduce particular services, e.g., passenger service, as distinguished from the total abandonment of a line pursuant to Section 1(18) of the Act. The Commission's ultimate power to authorize discontinuance exists under both Section 13a(1) and 13a(2), although the procedures are different in that Section 13a(2) provides a more effective means for the protection of state interests.

Since the trains of Susquehanna operate wholly within New Jersey (J.S. 26), we believe that the lower court was in error when it decided that the interstate character of the passengers' journey permitted the railroad to avoid the procedure of Section 13a(2), and thus to avoid an initial application to state authorities. The language of the statute requires that Section 13a(1) be utilized for an interstate train, and Section 13a(2) for an intrastate train, even though both trains are engaged in transporting passengers in interstate commerce.

Congress selected a "train or ferry" as the specific units which might be discontinued under Section

13a(1), and these are precise physical units distinguishable from the broad terms "railroad" or "transportation" (cf. Section 1(3)(a) of the Act). This distinction was critical in the evolution of Section 13a. The original bill permitted "discontinuance \* \* \* of the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign, and intrastate commerce \* \* \* or of the operation or service of any station, depot, or other facility" (S. 3778), but the bill as enacted applies only to "the operation or service of any train or ferry." These changes reflect in part the opposition to the original bill by Senator Russell, who characterized it as a most "forthright assault upon the right of local self-government and the rights of States" (104 Cong. Rec. 10850. See also 104 Cong. Rec. 10853-54, 12542, 12530.) The Senate subsequently adopted an amendment to Section 13a so that it would cover "any train or ferry engaged in the transportation of passengers or property in interstate or foreign commerce" (104 Cong. Rec. 10849-10850, 10866). That language would still have permitted the result reached by the court below, and indeed would have left very few train services subject to State jurisdiction. As the bill emerged from conference, however, it contained the present language which seems clearly to reflect the views expressed by Senator Smathers, who proposed that State jurisdiction be preserved over "any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train" (104 Cong. Rec. 10852).

As the dissent of Circuit Judge McLaughlin points out below (J.S. 35), Section 13a(1) was used immediately upon enactment to accomplish the discontinuance of passenger ferry service of the New York Central and the Erie between New Jersey and New York. *New Jersey v. United States*, 168 F. Supp. 324 (D.N.J.), affirmed, 359 U.S. 27, *New Jersey v. United States*, 168 F. Supp. 342 (D.N.J.), consistent with the express inclusion of the word "ferry" in Section 13a(1). But in the present matter it is the bus which crosses the state line; a "bus" is an instrumentality no less distinctive than a "train" or a "ferry"; and:

If § 13a(1) had been meant to contain the power to wipe out an entire intrastate rail-road passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". [J.S. 37.]

The lower court sought to overcome this impediment to Susquehanna's position by deciding that the (interstate) bus was a "service" of the train (J.S. 34). It seems clear, however, that Section 13a distinguishes between a "train or ferry" which crosses a state line, and one which does not, regardless of connecting facilities for the effectuation of interstate transportation, and that to add a "bus" to a "train" as the "service" of that train, so as to make of it a train operating between states, is contrary to the language of the statute.

For the foregoing reasons the United States and the Interstate Commerce Commission believe that the district court was in error in adjudging that the



provisions of Section 13a(1) of the Act were appropriately invoked by Susquehanna, and in setting aside the Commission order of January 18, 1961 which dismissed for lack of jurisdiction the proceedings instituted by Susquehanna with the Commission.

Respectfully submitted.

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